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In the Supreme Court of the United States

OCTOBER TERM, 1954

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

DREXEL & COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered on February 25, 1954.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 288-289) was entered on December 23, 1952, and has not been reported. The opinion of the Court of Appeals (R. 305-312) is reported in 210 F. 2d 585.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on February 25, 1954 (R. 313). The time for filing a petition was on May 21, 1954, extended to June 21, 1954, by order of Mr. Justice Reed.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See also Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 835, 15 U.S.C. 79a *et seq.*

QUESTION PRESENTED

Whether, under the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission's jurisdiction over fees payable by registered holding companies covers a fee claimed for services to a registered holding company to protect its interests in the reorganization of its subsidiary, when the fee is payable by the parent and not out of the assets of the subsidiary in reorganization.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are set forth in the Appendix, *infra*, pp. 25-30.

STATEMENT

This case presents the question whether the Securities and Exchange Commission has statutory jurisdiction pursuant to the Public Utility Holding Company Act of 1935 to pass upon a fee payable by Electric Bond and Share Company ("Bond and Share"), a registered holding company, for services rendered in consolidated proceedings dealing with the reorganization of a subsidiary, Electric Power & Light Corporation ("Electric"), and related transactions by Bond and Share.

By order dated August 22, 1942, entered pursu-

ant to Section 11(b) (2) of the Act, the Commission directed among other things that Electric be dissolved, and that Electric and Bond and Share submit to the Commission a plan or plans for the effectuation of the order. *Electric Bond and Share Company*, 11 S.E.C. 1146, Holding Company Act Release No. 3750. The order was affirmed on appeal. *American Power & Light Company v. Securities and Exchange Commission*, 141 F. 2d 606 (C.A. 1), affirmed, 329 U.S. 90.

During the years 1945-1948 Bond and Share and Electric submitted to the Commission, pursuant to Section 11(e) of the Act, plans for the dissolution of Electric. The plans provided for the exchange by Bond and Share and other stockholders of Electric of their shares of Electric stock for stock in United Gas Corporation and Middle South Utilities, Inc., and for the payment of cash by Bond and Share in settlement of claims of Electric and its subsidiaries. Extensive hearings were held. The plan ultimately consummated was filed by Electric in 1948 (R. 300, item 6).¹ On the same day, Bond and Share filed an application-declaration pursuant to Sections 9, 10, 11 and 12 of the Act (R. 300, item 8) requesting the necessary Commission approval of its "sale" of its holdings of Electric stock, its "acquisition" of shares of the

¹ This reference is to a stipulation as to the contents of the record on appeal to the court of appeals. Not all of the stipulated record was printed there, nor is it all printed in the record before this Court. However, the entire record before the court of appeals has been transmitted to the Clerk of this Court and is, therefore, available for reference.

stocks of United and Middle South, and its payment of \$2,200,000 in settlement of intra-system claims.² These transactions, and Commission approval thereof, were necessary in order to permit consummation of the plan. The plan and Bond and Share's amended application-declaration were considered together by the Commission in consolidated proceedings, and were approved by order dated March 7, 1949 (R. 36-41), subject to a specific reservation of jurisdiction "to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto," other than certain fees separately approved as part of the plan.

The plan was enforced by order of the United States District Court for the Southern District of New York (R. 301, Item 15), which was affirmed on appeal. *In re Electric Power & Light Corporation*, 176 F. 2d 687 (C.A. 2), stay denied, 337 U.S. 903.

Drexel & Co. ("Drexel") had been retained by Bond and Share in May, 1945, and advised Bond

² Section 2(a)(22) of the Act defines "acquisition" to include "any purchase, acquisition by lease, exchange, merger, consolidation, or other acquisition." Section 2(a)(23) of the Act defines "sale" to include "any sale, disposition by lease, exchange or pledge, or other disposition." In *Electric Bond and Share Company*, Holding Company Act Release No. 11,004 (February 6, 1952), petition for review withdrawn, the Commission held that Sections 9(a) and 10 of the Act were applicable to Bond and Share's acquisition of securities in connection with the reorganization of Electric.

and Share with respect to the formulation of plans and the proceedings before the Commission. No fee had been agreed upon; both Drexel and Bond and Share understood that the amount to be paid would be "such amount as might be approved by the Commission" (R. 193).

Thereafter proceedings were had before the Commission pursuant to the reserved jurisdiction to pass upon fees and expenses. Bond and Share filed a "Petition * * * for Approval of Payment of Fees and Expenses," requesting that the Commission approve aggregate payments of approximately \$265,000 (later increased to \$305,000), including \$100,000 to Drexel (R. 54-55),³ and a petition for reimbursement by Electric (R. 119).

Drexel filed a "Petition * * * for Approval of Fee for Services on Behalf of Electric Bond and Share Company," together with a supporting statement (R. 59-117). The petition was introduced by the statement:

Drexel & Co. has rendered to and on behalf of Electric Bond and Share Company services in connection with the reorganization of Electric Power & Light Corporation and transactions and matters incident to such reorganization.

It requested the Commission to permit Bond and Share to pay the \$100,000 claimed for such services. After due notice the Commission held hear-

³ The Drexel item appears as a payment to Edward Hopkinson, Jr., the senior partner of the firm (R. 118).

ings on these and other applications for approval of fees and expenses. By Findings and Opinion and Order dated April 21, 1952, the Commission approved and directed payment of approximately \$590,000 of fees and expenses by Electric, and \$250,000 of fees and expenses by Bond and Share. The amount approved for payment to Drexel was \$50,000. Bond and Share's application for reimbursement from Electric was denied. (R. 212-270.)

On June 19, 1952, the Commission filed a Supplemental Application for approval of the payment, and of the denial of payment, of fees and expenses as determined by the Commission in the United States District Court for the Southern District of New York (R. 270-277), which had reserved appropriate jurisdiction in its order approving and enforcing the dissolution plan (R. 41-47).

Drexel, among others, filed objections to the Commission's Supplemental Application (R. 278-282). Bond and Share did not object in court to the Commission's denial of its claim for reimbursement from Electric.

After a hearing on the Supplemental Application and the objections thereto, the Court entered its opinion and order overruling the objections and approving the Commission's order (R. 288-292). Drexel and others appealed. The Court of Appeals reversed the order below as to the fee of Drexel "for lack of jurisdiction in the Commission," and otherwise affirmed it (R. 312).

The opinion below concedes that the Commission's power and duty to determine whether a Sec-

tion 11(e) plan is "fair and equitable to the persons affected" give the Commission jurisdiction to determine what allowances shall be made for fees and expenses (R. 307). It holds, however, that a fee payment by Bond and Share itself does not "affect" its stockholders in such a way as to be relevant in determining whether Electric's plan is fair and equitable (R. 308). The opinion below considers also the provisions of Section 11(f) of the Act, authorizing the Commission to pass upon fees payable "in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof". It suggests, however, that Section 11(f) is limited to proceedings where a receiver or trustee has been appointed, and holds that the fee to be paid by Bond and Share to Drexel is not a fee paid "in connection with" the proceeding for the reorganization of Electric within the meaning of the quoted phrase as used in Section 11(f) (R. 310).

The writ is sought for the purpose of securing review of that part of the decision below which denies the Commission's jurisdiction to pass upon the Drexel fee.

REASONS FOR GRANTING THE WRIT

This case presents an important question of Federal law which should be settled by this Court. Moreover, the decision below conflicts, at least in principle, with the decision of the Court of Appeals for the District of Columbia Circuit in *Halsted v.*

Securities and Exchange Commission, 182 F. 2d 660 (C.A. D.C.), certiorari denied, 340 U. S. 834. An interpretation of the Act contrary to the decision below has been consistently followed by the Commission throughout the history of the Act in some 30 or more cases; has been accepted by the holding companies involved (including Bond and Share); and, up to the present case, has been enforced by the courts without question. There are currently pending before the Commission at least four proceedings, involving fee applications of several millions of dollars, in which this issue is involved.

1. The decision below—based upon a strict and piecemeal interpretation of Section 11(e) and (f) of the Act, without regard to the statutory context from which the general standards of Section 11 “derive much meaningful content”, *American Power & Light Co. v. S.E.C.*, 329 U. S. 90, 104. Its rejection of the Commission’s Section 11(e) jurisdiction of the Drexel fee depends upon the concept that the fee is “but a business expense of Bond and Share,” described as “a solvent corporation whose business affairs are conducted by its own management”. (R. 308, 307). The court ignores the Commission’s regulatory authority applicable to Bond and Share as a registered holding company. The opinion does not even advert to the Commission’s jurisdiction pursuant to Sections 10 and 12 of the Act (Appendix, *infra*, pp. 26, 29-30) over fees payable by Bond and Share by reason of its own direct participation in the transactions incident to the reorganization, namely its acquisition of securities from Electric, its disposition of its holdings in

Electric, and its settlement of the intrasystem claims. Each of these transactions required Commission approval, and was the object of Bond and Share's application-declaration filed with the Commission; the proceeding with respect to that filing was consolidated with the Section 11(c) proceeding; and the Commission's approval of these transactions was conditioned upon subsequent approval of the fees involved. To the extent that the services of the respondent related to these transactions, Sections 10 and 12 of the Act specifically grant the Commission jurisdiction over the fees involved. Thus the ruling of the court below that the services were not rendered "in connection with" the reorganization of Electric, even if assumed to be correct, would not support the holding that the Commission was without jurisdiction to pass upon the Drexel fee.

Actually the Commission's jurisdiction to pass upon fees payable by solvent holding companies in carrying on their business affairs is extensive. Thus, a registered holding company, however solvent, may issue and sell its securities except "in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective". Holding Company Act, Section 6(a), Appendix, *infra*, p. 25. One of the grounds for the Commission's refusing to permit such a declaration to become effective is a finding, pursuant to Section 7(d)(4) of the Act, that:

the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly,

in connection with the issue, sale, or distribution of the security are not reasonable.

Nor may any registered holding company, however solvent, acquire, directly or indirectly, any securities or utility assets unless "the acquisition has been approved by the Commission under section 10" (Section 9(a)). One of the grounds for refusing approval of such an acquisition is a Commission finding, pursuant to Section 10(b)(2) of the Act, that:

the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable * * *.

Pursuant to Section 12(d) of the Act, no registered holding company, however solvent, may sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding "fees and commissions," among other things, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

Finally, pursuant to Section 12(f) of the Act, no registered holding company, however solvent, may negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under the Act, with any company in the same holding company system, in contravention of such rules and regulations or orders regarding

"costs," among other things, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers.

Thus the solvency of Bond and Share, and the fact that it was not the company being reorganized in these proceedings, do not provide an immunity from the Commission's statutory fee jurisdiction. It is not necessary to decide whether Sections 10 and 12 alone supply an adequate basis for the Commission's exercise of jurisdiction with respect to the Drexel fee. Rather, with Section 7, they support the general authority of the Commission to pass upon fees and expenses payable by solvent registered holding companies in connection with ordinary financial transactions, and refute the reasons advanced by the Court below for holding that Section 11 of the Act, requiring the Commission to pass upon reorganization fees and expenses incurred in the simplification and integration of holding company systems, excludes jurisdiction over fees payable by a registered holding company for services rendered to protect its interests in the reorganization of a subsidiary.

The issuance of securities, the acquisition of utility assets, the disposition of securities, and the intrasystem transactions to which Sections 7, 10, and 12 of the Act apply are all acts generally performed by solvent companies in connection with their own business, and also by parent companies in connection with the reorganization of their subsidiaries. As the court suggested in *In re Electric*

Bond and Share Co., 80 F. Supp. 795, 798 (S. D. N.Y.), since Congress granted the Commission such authority over those financial matters, it is not plausible to assume that less extensive power was granted in a Section 11 reorganization.

2. It is submitted that through Sections 11(e) and (f) of the Act Congress intentionally granted the Commission full jurisdiction over all fees incurred by regulated companies in connection with Section 11 reorganizations.

A major purpose of the Congress in providing for Commission supervision over fees and expenses incurred in reorganizations pursuant to the Act was the protection of investors in holding company securities. Thus Senator Wheeler, sponsor of the legislation in the Senate, stated:⁴

That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word “reorganization.” In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganizing bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that very danger the bill puts the entire process of reorganization, including fees and so-called “re-

⁴ 79 Cong. Record 4607, March 28, 1935.

organization plans", under the control of the Securities and Exchange Commission.

In reporting the proposed legislation to the Senate, the Senate Committee on Interstate Commerce stated with respect to Section 11: ⁵

Subsections (a), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under the supervision of the Federal courts. * * * Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities. *Fees, expenses, and remunerations paid in connection with any such reorganization*, whether under Section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission. [Emphasis supplied.]

Section 11(e) of the Act gives the Commission the power, and imposes upon it the duty, to determine whether a plan of reorganization submitted to it is "fair and equitable to the persons affected by such plan." According to the analysis of the court in *In re Electric Bond & Share Co.*, *supra*, jurisdiction over fees "is an inseparable part of the

⁵ Senate Report No. 621, 74th Cong., 1st Sess., at p. 33. See also the same report at pp. 16-17, 55-60.

determination of whether a plan is fair and equitable, * * *. If the Securities and Exchange Commission has no power over fees, it may well approve a plan which in the end is not in its judgment fair and equitable, because of the distribution of fees authorized by other jurisdictions." This view "is supported by the very broad powers which are bestowed upon it [the Commission] in the opening words of section 11(e)," providing that plans shall be submitted in "accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers."

The power over fees which is impliedly granted by Section 11(e) is expressly granted by the last sentence of Section 11(f), which gives the Commission authority to require approval of "fees, expenses, and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof." It is this section which is referred to by this Court in *American Power & Light Co. v. S.E.C.*, 329 U. S. 90, 114.

The particular issue here is the application of these sections to a fee application where the "persons affected" are the investors in the parent company, and where the funds to pay the fee are not withdrawn from the assets of the company under reorganization, but are contributed directly by the parent company. Decisions of this Court in comparable situations, however, are helpful in the application of the Act in these particular circum-

stances. In *American Power and Light Co. v. S.E.C.*, 325 U. S. 385, it was held that under Section 24(a) of the Act a stockholder of Bond and Share was a "person aggrieved" by a Commission order directed to an operating subsidiary of a holding company subsidiary of Bond and Share, giving to the stockholder of the grandparent company the right to seek judicial review of the Commission order. Here the stockholders of Bond and Share are far more directly concerned. The plan itself provided for the acquisition by Bond and Share, in exchange for its holdings of securities in Electric, of new securities with a market value of approximately \$65,000,000 at the time of consummation.⁶ It also provided for the payment by Bond and Share to Electric of \$2,200,000 in settlement of claims. The interests of Bond and Share and its stockholders were among the most important of those dealt with in the plan proceedings. Bond and Share's stockholders are "affected" by the fees to be paid by Bond and Share for services rendered in connection with the proceedings, just as they and the direct stockholders of Electric are "affected" by the fees to be paid by Electric itself.

3. The opinion below suggests that the fee jurisdiction conferred by Section 11(f) should be construed as inapplicable to any reorganization proceeding under Section 11(e) of the Act, unless a

⁶ Pursuant to the plan, Bond and Share received 803,329 shares of the common stock of Middle South Utilities, Inc., and 2,870,653 shares of the common stock of United Gas Corporation.

trustee or receiver is actually appointed therein.⁷ That interpretation would contravene *Halsted v. Securities and Exchange Commission*, 182 F. 2d 660 (C.A. D.C.), where Section 11(f) was held to be applicable in a Section 11(e) reorganization. See also *S.E.C. v. Cogan*, 201 F. 2d 78, 81 (C.A. 9).

The legislative history and the pattern of regulation under the statute show that the words "in any such proceeding" in the last sentence of Section 11(f) were intended to relate back to the types of proceeding specified in the clause immediately preceding those words, or to all court proceedings covered by the first two sentences of Section 11(f) in which a trustee or receiver might be appointed,⁸ but were not to be limited to a proceeding in which a trustee or receiver is actually appointed.⁹ An

⁷ Section 11(e) empowers the enforcement court to appoint a trustee, but that power has never been exercised in any of the proceedings (over 100 in number) for enforcement of Section 11(e) plans.

⁸ Subsections (d) and (e) of Section 11 of the Act, like Section 77B of the Bankruptcy Act in effect when the Holding Company Act was passed, authorize the enforcement court to appoint a trustee, but do not require such an appointment.

⁹ Section 11(f) as originally drafted (§ 11(d) of S. 1725, and § 10(d) of H. R. 5423, introduced February 6, 1935), and as reported to the Senate (§ 11(f) of S. 2796, reported May 14, 1935), started with a provision authorizing the Commission to institute proceedings for the reorganization of regulated companies pursuant to Section 77B of the Bankruptcy Act. The sentence conferring fee jurisdiction then used the phrase "whether under said Section 77B or otherwise" instead of the words "in any such proceeding". Later (June 7, 1935, 79 Cong. Rec. 8844-5) the Senate sponsors of the Bill proposed and the Senate adopted an amendment to the first two sentences of Section 11 (f), eliminating all reference to Section 77B. There was no proposal before the Committee or on the floor of the Senate to restrict the Commission's jurisdiction over fees to be

interpretation of Section 11(f) that would permit Commission supervision over fees only in proceedings where a court has appointed a receiver or trustee and is itself in a position to supervise fees and expenses, but would deny the Commission any supervision over such matters where the entire reorganization is conducted before the Commission, would make no statutory sense and would thwart the intent of Congress.

Basically, however, the heart of the opinion below appears to be that the fees are not paid "in connection with" the reorganization as required by Section 11(f) because they are paid not out of the assets of the reorganized company, but by one of its security holders. On that issue the decision of this Court in *Leiman v. Guttman*, 336 U. S. 1, is very persuasive. That case decided the question whether, under Chapter X, the bankruptcy court has exclusive jurisdiction of counsel fees whether paid out of the estate or paid by stockholders directly. This Court upheld the exclusive jurisdic-

paid in connection with "any reorganization, dissolution, liquidation, bankruptcy, or receivership" of a regulated company. No amendment of Section 11(f) was adopted, except as proposed by the sponsors of the Act. Without any reported discussion in committee or on the floor, the words "whether under said Section 77B or otherwise" were dropped from the fee sentence of Section 11(f), and the words "in any such proceedings" substituted (§ 11(f) of S. 2796, ordered printed June 7, 1935, showing amendments agreed to), for the sole purpose of reflecting the elimination of all prior references to Section 77B. Still later (§ 11(f) of S. 2796 as passed by the Senate June 11, 1935), and again without any discussion or indication of intent to limit fee jurisdiction, the word "proceeding" was substituted for the word "proceedings".

tion of the bankruptcy court, stating (336 U. S. 1, 8):

* * * § 221 (4) is written in pervasive terms—it applies to “all payments” for services “in connection with” the proceeding or “in connection with” the plan and “incident to” the reorganization, whoever pays them. A statute establishing such broad supervision over committees cannot be presumed to be niggardly in its grant of authority when it deals with the matter which of all the others has the most direct impact on those whom it aims to protect.

* * * The statute was designed to police the return which all stockholders obtain from reorganization plans. The net return cannot be kept under supervision if private arrangements expressed in escrow agreements are to control. For the impact of excessive fee claims is the same whether they are charged directly against the estate or against the claim which represents a proportionate interest in the estate.

Moreover, the opinion below is in conflict in principle, at least, with *Halsted v. Securities and Exchange Commission*, 182 F. 2d 660 (C.A. D.C.). That case arose from an application of a committee for stockholders of a registered holding company, filed pursuant to Section 12(e) of the Act, for permission to solicit stockholders for contributions to finance committee operations in a Section 11(e)

reorganization. The Commission found its authority to refuse such permission in the fee provisions of Section 11(f), and the court upheld that interpretation. The court found (at p. 666) that the Commission's authority over fees "would be of little worth or significance if a court were to compel the Commission at the present stage of the case to permit the type of activity here contemplated." It also stated (182 F. 2d at 665):

What is really in issue in this case is not representation; it is fees. * * * The express provisions of section 11(f), quoted above, give the Commission direct control over the fees to be allowed in enumerated proceedings under the Act. We cannot ignore this provision, or invite its evasion. Under a closely comparable provision of the Chandler Act, the Supreme Court has recently declared that investors are entitled to full protection, even as against their own contractual arrangements. [Citing and quoting from *Leiman v. Guttman*, *supra*]

The court below did not cite *Leiman v. Guttman*, and attempted to distinguish the *Halsted* case on the ground that there the committee announced that it intended to seek reimbursement from the assets of the company undergoing reorganization. But, here too, Bond and Share sought reimbursement from the estate of Electric, and did not recede from that position until after the Commission had passed upon the amount of the fee, had denied the application for reimbursement, and had applied to

the district court for enforcement of its decision.¹⁰

4. It should not be assumed that the payment of fees by a parent for services rendered to it in connection with the reorganization of a subsidiary is an unusual or unimportant feature in the reorganization of holding company systems. In many systems similar to Bond and Share's the top company can bring itself into compliance with the Act only through the elimination or reorganization of its subsidiary companies. When these companies are not one hundred percent owned by the parent company, it is right and proper that they should have their own independent counsel and experts to protect the interests of all of their security holders. It is equally appropriate that the top companies should employ the services of counsel and experts to protect their own interests for the benefit of their own security holders. In a strict corporate sense the reorganization may be the reorganization of a subsidiary, but in the terms of the act it is a step toward bringing the whole system into conformity with the standards of the Act and, in order that all security holders may be protected, all phases of it must be subject to Commission jurisdiction. Under the holding of the court below a large seg-

¹⁰ In *The United Corporation v. S.E.C.*, No. 99, pending on petition for certiorari to the Third Circuit, petitioner asserts that the decision of the Court of Appeals (211 F. 2d 231) is in conflict with the decisions of the court below in this case. In the *United* case it was held that the parent was not entitled to reimbursement for fees and expenses incurred in the reorganization of its subsidiary. The same issue was involved in the Commission's order denying Bond and Share reimbursement from Electric, but was not the subject of appeal and was therefore not before the court below.

ment of the fees in these reorganizations would go unreviewed.

As an example, we may refer to the proceedings under section 11 with respect to the Bond and Share system. Most of the proceedings for the simplification of the system and the elimination of control over non-retainable properties have involved the reorganization of subsidiary companies, rather than of Bond and Share itself. From June 1946 through March 1954 the Commission has had occasion to pass upon requests by Bond and Share to pay approximately \$1,232,000 to persons so retained, \$460,000 in proceedings for the reorganization of Bond and Share itself, and \$772,000 in proceedings for the reorganization of subsidiary companies. Approximately \$1,070,000 was allowed by the Commission, \$408,000 in proceedings for the reorganization of Bond and Share itself, and \$672,000 in proceedings for the reorganization of subsidiary companies.¹¹

¹¹ Proceedings for the reorganization of Bond and Share: *Electric Bond and Share Company*, Holding Company Act Releases No. 8084 (March 26, 1948), No. 11,903 (May 11, 1953), and No. 11,978 (June 5, 1953). Applications are pending for additional such allowances aggregating \$276,500.

Proceedings for the reorganization of subsidiary companies other than Electric: *United Gas Corporation*, Holding Company Act Releases No. 5677 (March 21, 1945) and No. 6734 (June 21, 1946); *Pennsylvania Power & Light Company*, Holding Company Act Releases No. 6949 (October 17, 1946) and 7599 (July 24, 1947), original request shown in transcript pp. 538-539, File No. 54-128-1-5; *National Power & Light Company*, Holding Company Act Release No. 7172 (January 31, 1947); *American Power & Light Company*, Holding Company Act Releases No. 11,517 (October 1, 1952) and 11,904 (May 11, 1953); *Portland Gas & Coke Company*, Holding Company

Thus the decision below would deny the Commission any supervision whatsoever over more than half of the fees paid by Bond and Share in reorganizations to effectuate compliance with Section 11.

Throughout its administration of Section 11 of the Act, the Commission has passed upon the fees to be paid to representatives of parent holding companies for services rendered in connection with the reorganization of their subsidiaries.¹² Until the

Act Release No. 11,560 (October 31, 1952); *American & Foreign Power Company*, Holding Company Act Release No. 11,976 (June 5, 1953).

¹² See *Public Service Corp. of N. J.*, Holding Company Act Release No. 12,000 (June 16, 1953), affirmed in part, reversed in part, on other issues, *In re Public Service Corp.*, 211 F. 2d 231 (C.A. 3); *Eastern Gas & Fuel Associates*, H.C.A. Release No. 11,954 (May 29, 1953), enforced in part, reversed in part, on other issues (D. Mass., Civil Action No. 50-168, Dec. 23, 1953); *Niagara Hudson Power Corp.*, H.C.A. Release No. 11,667 (January 14, 1953), approved and enforced, 114 F. Supp. 683 (N.D. N.Y.), appeal on another issue pending; *Bauer, Trustee of Pittsburgh Rys. Co. and Philadelphia Co.*, H.C.A. Release No. 11,592 (November 18, 1952); *Interstate Power Co.*, H.C.A. Release No. 11,359 (June 26, 1952); *Northern States Power Co. (Del.)*, H.C.A. Release No. 11,145 (April 8, 1952), approved in part and disapproved in part, on other issues, 119 F. Supp. 331 (D. Minn.), affirmed, C.A. 8, April 19, 1954; *The North American Co.*, H.C.A. Releases No. 10,583 (May 28, 1951) and 10,304 (December 21, 1950); *National Power & Light Co.*, H.C.A. Release No. 10,321 (December 28, 1950); *The North American Co.*, H.C.A. Release No. 10,256 (November 30, 1950); *Pennsylvania Edison Co.*, H.C.A. Release No. 9988 (July 21, 1950); *Central States Utilities Corp.*, H.C.A. Release 9411 (October 10, 1949); *Market Street Ry. Co.*, H.C.A. Release No. 9376 (September 30, 1949); approved in part and disapproved in part, on other issues unreported, N.D. Calif., Civil Action No. 29,723, July 11, 1950, affirmed *sub nom. S.E.C. v. Cogan*, 201 F. 2d 78 (C.A. 9); *Louisville Gas & Electric Co. (Del.)*, H.C.A. Release No. 9346 (September 16, 1949); *The Middle West Corp.*, H.C.A. Release No. 8547 (October 1, 1948); *Central Public*

present case, no objection has been made to the exercise of jurisdiction over such allowances.¹³

There are presently pending before the Commission in various stages at least four reorganizations, where fee applications have been filed and the question at issue is involved. In the case of the Standard Power & Light Corporation system, the claims which involve this issue, in whole or in part, run over \$3,500,000.¹⁴ In the United Corporation, Northern New England, and Pennsylvania Gas and Electric systems comparable issues are involved.

Utility Corp., H.C.A. Release No. 8468 (August 25, 1948); *Scranton-Spring Brook Water Service Co.*, H.C.A. Release No. 8358 (July 15, 1948); *The United Gas Improvement Co.*, H.C.A. Release No. 8321 (June 29, 1948); *Buffalo, Niagara & Eastern Power Corp.*, H.C.A. Release No. 8024 (March 9, 1948); *Central States Power & Light Corp.*, H.C.A. Release No. 7916 (December 5, 1947); *Midland Utilities Co.*, H.C.A. Release No. 7735 (September 23, 1947); *The Laclede Gas Light Co.*, H.C.A. Releases No. 6954 (October 21, 1946) and No. 6306 (October 17, 1945); *The United Corp.*, H.C.A. Release No. 6509 (March 22, 1946); *Columbia Gas & Electric Corp.*, H.C.A. Release No. 5460 (December 1, 1944), 17 S.E.C. 549, approved and enforced, unreported, D. Del., Civil Action No. 288, May 18, 1945; *Cities Service Co.*, H.C.A. Release No. 4944 (March 14, 1944), 15 S.E.C. 536; *Puget Sound Power & Light Co.*, H.C.A. Release No. 4835 (January 13, 1944); and *Derby Gas & Electric Corp.*, H.C.A. Release No. 3236 (December 30, 1941).

¹³ On the weight to be accorded the consistent interpretation of a statute by the agency designated by Congress to administer it, see *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Ass'n.*, 310 U. S. 534, 549; *North American Utility Securities Corp. v. Posen*, 176 F. 2d 194, 197 (C.A. 2).

¹⁴ Fee claims against registered holding companies frequently involve a single amount for services rendered to the company both in connection with its own reorganization, and in connection with reorganizations of subsidiary companies.

CONCLUSION

For the reasons that the decision below contravenes the word and the spirit of the Holding Company Act on a jurisdictional issue of importance in reorganizations, that it conflicts in principle with a decision of the Court of Appeals for the District of Columbia Circuit, and that it would upset a well-established construction of the statute by the Securities and Exchange Commission, and impair the Commission's ability to give to investors the protection hitherto available under Section 11, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE, 1954.

APPENDIX

The following provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*) are pertinent:

SEC. 6(a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * * * *

SEC. 7 * * *

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

* * * * *

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale,

or distribution of the security are not reasonable;

* * * * *

SEC. 9(a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business.

* * * * *

SEC. 10 * * *

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

* * * * *

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; * * *

* * * * *

SEC. 11 * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such

extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary com-

pany thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

* * * * *

SEC. 12 * * *

(d) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules

and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of the title or the rules, regulations, or orders thereunder.

* * * * *

(f) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder.